SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 637

TOWN OF HEMPSTEAD, PALMER D. FARRINGTON, as Presiding Supervisor of the Town of Hempstead, RALPH G. CASO, as Supervisor of the Town of Hempstead, JOHN H. BENOIT, EASA EASA, JAMES F. NIEHOFF, and GEORGE A. MURPHY, as Councilmen of the Town of Hempstead, and JOHN A. MORHOUS, as Town Attorney of the Town of Hempstead,

Petitioners,

—against—

AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., NORTHWEST AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., and UNITED AIR LINES, INC.,

THE PORT OF NEW YORK AUTHORITY,

CHARLES H. RUBY, as President of the Air Line Pilots Association, International and as Representative of that class of persons hereinafter mentioned, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association, on behalf of the Association and on behalf of that class of persons hereinafter mentioned, and HARRY F. CLARK, THOMAS M. BARTLEY, JR., and RUSSELL G. DERICKSON, individually and on behalf of the class of persons hereinafter mentioned, and

THE ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY (Intervenor),

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TOWN OF HEMPSTEAD, *et al.*,

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AMERICAN AIRLINES, INC., *et al.*, THE PORT OF NEW YORK AUTHORITY, CHARLES H. RUBY, *et al.*

and

THE ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY (Intervenor),

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION*

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in the petitioners' Appendix (P.Ap. 1a-15a),** is now reported at 398 F.2d 369. The

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* The airline respondents, The Port of New York Authority and Air Line Pilots Association, International join in this brief.

** "P.Ap." refers to the Appendix to the Petition for a Writ of Certiorari. "R.Ap." will refer to the Appendix hereto. When one of the lower court opinions reprinted in the petitioners' Appendix is cited herein, and the opinion cited is not otherwise apparent from

opinion of the United States District Court for the Eastern District of New York (Dooling, J.) (P.Ap. 16a-34a) is reported at 272 F. Supp. 226.

Jurisdiction

The petitioners have invoked the authority of this Court to review cases in the courts of appeal under 28 U.S.C. § 1254(1). Under 28 U.S.C. § 2101(c) and Rule 22(3) of this Court their Petition for a Writ of Certiorari was timely. The respondents received copies of the Petition, by mail, on October 14, 1968.

Constitutional, Statutory and Other Provisions

In addition to the provisions of the Federal Aviation Act of 1958, as amended (49 U.S.C. § 1301, *et seq.*), set out in the Appendix to the Petition (P.Ap. 35a-41a), this case also involves the constitutional provisions, and the Town of Hempstead's noise ordinance, which are reproduced, *infra,* in the Appendix hereto (R.Ap. 1a-6a).

Questions Presented

The Petition lists three questions for review (Pet. 2). Stated summarily they are whether Article II of the Town of Hempstead's Unnecessary Noise Ordinance (the "Ordinance") is invalid (1) because it operates in a field over which the national government has preempted the power of

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the context, the abbreviations "D.C.Op." and "C.A.Op." will be used. The Petition for a Writ of Certiorari itself will sometimes be abbreviated herein as "Pet."

plenary regulation; or (2) as an undue burden on interstate and foreign commerce; or (3) because it is in direct conflict with valid and applicable regulation by the national government. The District Court concluded that the Ordinance is invalid on all three of these grounds (C.A.Op., P.Ap. 6a). However, the Court of Appeals held only that the Ordinance is invalid because of direct conflict with federal regulation, expressly finding it unnecessary to decide the first two questions listed above (P.Ap. 6a, 15a (n. 4)), even though it did say that "Any one of the District Court's three conclusions is enough, of course, to make the ordinance invalid" (P.Ap. 6a).

Statement of the Case

As stated in the Petition the jurisdiction of the District Court in this case was based on 28 U.S.C. § 1337 (giving jurisdiction in actions arising under acts of Congress regulating commerce) and 28 U.S.C. § 1331 (giving jurisdiction in controversies arising under the Constitution, laws or treaties of the United States). In addition, it was also based on 28 U.S.C. § 2201 (authorizing the granting of declaratory judgments).

The Town of Hempstead (hereinafter individually called "Hempstead") enacted the Ordinance on November 19, 1963.* In brief, it provides, with respect to aircraft, that it is unlawful to operate any aircraft that creates a "transient" noise within Hempstead, for a duration greater

* The Ordinance was amended on March 10, 1964, and, by stipulation, it is the amended version that is at issue in this action. Since the record does not contain a composite rendition of the Ordinance as amended, such a composite, based on the record, is included in the Appendix hereto (R.Ap. 1a-6a).

than twelve seconds from 7:00 a.m. to 7:00 p.m., or greater than six seconds for the remainder of the day, which exceeds in any one octave band of sound frequency the listed decibel limit for that octave band as set forth in a "limiting noise spectrum" consisting of such limits for each of eight such octave bands; and that it is unlawful for aircraft to create "steady noise" (noise for a period of one minute at any time) which exceeds in any one octave band the listed limit set forth in a different limiting noise spectrum applicable to the same eight octave bands.

The airline respondents began this action on December 4, 1963 to obtain (i) a declaratory judgment that the Ordinance is unconstitutional and (ii) an order enjoining its enforcement. They instituted it because, as the District Court found, compliance with the Ordinance's noise requirements would force changes, including unsafe changes, in traffic patterns and altitudes prescribed by the Federal Aviation Agency (findings of fact Nos. 282, *et seq.*, P.Ap. 3a-4a; C.A.Op., P.Ap. 15a). Separate, but companion, actions of a similar nature were thereafter begun against the petitioners (hereinafter collectively called the "Town") by The Port of New York Authority (the "Port Authority") and the Air Line Pilots Association, International ("ALPA"). The Port Authority operates John F. Kennedy International Airport ("JFK"), the airport affected by the Ordinance, and ALPA is an unincorporated association representing pilots employed by scheduled airlines. On January 24, 1964 motions for an order granting a preliminary injunction were filed in each of the three actions, and subsequently the Administrator of the Federal Aviation Agency (the "FAA") intervened in support of the motions. The three separate actions were consolidated by consent on June 2, 1964.

Before ruling on the motions for a preliminary injunction, 4,088 pages of testimony, by 12 witnesses, were taken intermittently from September 21, 1964 to September 24, 1965 by Judge Dooling; 187 exhibits were offered and 53 affidavits, some very lengthy and technical, were submitted. After Proposed Findings of Fact, Proposed Counter-Findings of Fact and plaintiffs', defendants' and intervenor's written comments thereon were received by Judge Dooling, he made detailed and technical findings of fact consisting of 294 paragraphs and, on August 7, 1967, entered an order granting a preliminary injunction.

The Court of Appeals pointed out the reason for the exhaustive record:

> "The Town argued initially that aircraft could fly over the Town in compliance with both the ordinance and with FAA regulations governing landing and take-off patterns and procedures. There was no question, however, but that at the time the suit was brought, take-offs and landings at JFK regularly produced noise exceeding the relevant limiting noise spectrum of the ordinance.
>
> "The District Court made crucial findings of fact which contradict the Town's initial argument that compliance with the ordinance is possible without alterations in flight patterns and procedures, and the Town has now shifted its ground, arguing in essence that the ordinance is not an undue burden on interstate commerce, because 'the Town has unveiled a plan pursuant to which approximately 98% of all flights [to and from JFK] will avoid the Town while, at the same time, the present traffic capacity will be unaffected.' (Town's brief, p.22)." (P.Ap. 3a).

The Town's initial position that the Ordinance and the FAA regulations were compatible necessitated detailed evidence

as to how and why air traffic at JFK is regulated and operated as it is, how it would be affected by enforcement of the Ordinance, and the nature of aircraft noise, including the technical possibility of its control (see D.C.Op., P.Ap. 20a-23a, 27a-28a, 31a-32a). The respondents completed this complex presentation and rested on June 15, 1965.

The Town's case, consisting only of the testimony of its expert witness (the acoustician who authored the Ordinance), was put in during the period September 21-24, 1965, after the Town had had a full summer to prepare. It was only during this testimony, under cross-examination, that it was first admitted by the Town's expert that despite a considerable amount of testing he could not point to a single jet landing over Hempstead which had complied with the Ordinance. Moreover, no mention was made by this witness of any different "plan" for regulating air traffic at JFK. While the respondents do not concede that such a "plan" would be relevant (let alone safe), since it is not really within the power of the Town or the District Court to impose a different "plan" on the FAA, it is clear that the Town had ample opportunity to prepare and submit its ideas to the District Court and to argue their relevance.

It was only thereafter, in its Proposed Counter-Findings of Fact (and not through any evidence), that the Town first presented the new "plan" for regulating air traffic at JFK in a different fashion from that prescribed by the FAA, but allegedly permitting compliance with the Ordinance. The Town has since largely rested its argument on this "plan" (Pet. 5-6), but the very fact of its presentation is a demonstration that the long record has been conclusive that the air traffic patterns and altitudes required to achieve compliance with the Ordinance would be in conflict with

those prescribed by the FAA and now in force (D.C.Op., P.Ap. 34a). The fact of such conflict was further verified by the Town's failure to attack on appeal (C.A.Op., P.Ap. 6a) any of the crucial findings (Nos. 281-294, quoted at P.Ap. 3a-5a), "except that the Town still insists that its alternate plan, submitted to the District Court, could steer most flights away from the Town, thus assuring compliance with the ordinance" (P.Ap. 6a). As to this argument, the Town made no showing "that the District Court's finding [No. 286] to the contrary is clearly erroneous . . ." (C.A. Op., P.Ap. 6a), and has never explained how air traffic thus required to avoid flying over Hempstead could at the same time avoid violation of FAA requirements that dictate such flights.*

Thus, with such a plain basis for decision before it, the Court of Appeals did not go beyond the conflict of the Ordinance with applicable federal regulation (P.Ap. 6a) in affirming the August 7, 1967 order of the District Court, which granted the preliminary injunction restraining the Town from enforcing the Ordinance against aircraft operations. The Town seeks review of that judgment of affirmance.

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* In essence, the Town's "plan" is a contrived attempt to enable aircraft to comply with the Ordinance either by causing flights over Hempstead to be diverted over equally populous communities in the Borough of Queens in the City of New York (to the west and south of JFK), or by causing aircraft to avoid flying over Hempstead by engaging in flight procedures which would substantially reduce safety (D.C.Op., P.Ap. 33a; C.A.Op. n. 1, P.Ap. 3a-5a). In this regard, the record flatly contradicts the statements at pages 5 and 6 of the Petition that the Town's "plan" would permit compliance with the Ordinance without affecting the capacity of JFK or the safety factors now existing, and that the "evidence and exhibits" show that operations at JFK can be conducted differently while continuing to accommodate current traffic and allowing aircraft to avoid the Town and equally populous areas. *Ibid.*

ARGUMENT

The respondents submit that none of the Town's four reasons for the granting of a writ of certiorari is sufficient. None of them is of the character required by Rule 19(b). Before briefly dealing with each of these four reasons, the respondents wish to reemphasize that the District Court, in a careful opinion, rested its decision on several separate, alternate bases (see pages 2-3, *supra*), each sufficient to sustain the result (C.A.Op., P.Ap. 6a). All of these grounds are discussed at length in the District Court's opinion (P.Ap. 23a-32a), and this brief will not dwell on them.

In discussing, below, the Town's four points, we have directed particular attention to the Court of Appeals' affirmance on the ground of direct conflict between the Ordinance and federal regulation of air commerce.

(a) *No novel legal issue is presented.*

The legal question presented for review is not new. Ever since *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 209 (1824) it has been settled that when Congress has acted constitutionally all local police power regulations that directly conflict in any way with federal action must, under the Supremacy Clause, give way. This rule has been consistently and continuously reaffirmed. *E.g., Houston & T.C. R.R. Co.* v. *Mayes,* 201 U.S. 321, 328 (1906); *The Minnesota Rate Cases,* 230 U.S. 352, 399 (1913) ("There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power."); *Pennsylvania R.R. Co.* v. *Illinois Brick Co.,* 297 U.S. 447, 459 (1936); *Cloverleaf Butter Co.* v. *Patterson,*

315 U.S. 148, 155-56 (1942); *International Union of U.A.W.* v. *O'Brien,* 339 U.S. 454, 458-59 (1950) ("A state statute so at war with federal law cannot survive."); *Pennsylvania* v. *Nelson,* 350 U.S. 497, 505-509 (1956); and *Local 24, Int'l Bh'd of Teamsters* v. *Oliver,* 358 U.S. 283, 296 (1959). *Allegheny Airlines* v. *Village of Cedarhurst,* 238 F.2d 812 (2d Cir. 1956) (no petition for a writ) struck down a minimum altitude ordinance that Judge Dooling, in this case, held to be the "legal equivalent" (D.C.Op., P.Ap. 23a) of the Town's Ordinance, and, in doing so, specifically applied the above rule in a case involving Kennedy Airport. Indeed, in this case the Court of Appeals said that the Hempstead Ordinance "is in effect a more comprehensive regulation of air traffic patterns than was the Cedarhurst ordinance", and that *Cedarhurst* is a "square precedent for holding the Hempstead ordinance invalid" because of its conflict with federal regulation (P.Ap. 13a-14a).

Insofar as air commerce is concerned, Congress has long since "recognized the national responsibility", as it was called by Mr. Justice Jackson in 1944 (see D.C.Op., P.Ap. 32a), and assumed for the federal government full control of its regulation. It has placed the regulatory powers in the FAA (see pages 10-11, 16, *infra*). Since there is no suggestion that the Acts of Congress under which air commerce is regulated are invalid, and in view of the established principle of the supremacy of valid federal regulation over conflicting local law, there is not only no new issue presented here—there is no issue at all of "the entire relationship of federal-local" governmental interests (Pet. 4, 6) as urged by the Town as its first reason for further review.

The Town also argues that, since differing local situations of wind, terrain, obstructions, etc. require the FAA

to direct air traffic differently (*"ad hoc"*) from airport to airport (which only makes it more important that there be unified control), it should be permitted to reopen the record on the issue of whether the Town's late-blooming "plan" for operating air traffic at JFK would sustain the validity of the Ordinance. The Town asserts that the plan "would not affect the traffic capacity at the Airport, but would retain the safety factors now existing" (Pet. 5); it claims: "In essence . . . that the airport is improperly operated . . ." (Pet. 5); and it apparently concludes that the courts below were both in error in calling the plan "irrelevant". It is worth noting, in passing, that the District Court did devote attention in its opinion to the inadequacies of the "plan" (D.C.Op., P.Ap. 33a-34a) and, in finding No. 286 (C.A.Op., P.Ap. 4a), expressly found, without any subsequent showing of error before the Court of Appeals (C.A.Op., P.Ap. 6a), that:

> "There is no reliable evidence that a set of procedures could be devised for Kennedy Airport in the present state of aviation development which could without substantial sacrifice of the interest in flight safety assure either practical or complete compliance with the Hempstead Ordinance."

Regardless of the plan's deficiencies, what the Town overlooks is that Congress specifically directed the FAA Administrator to develop the air traffic regulations to which the Town now objects (see, *e.g.*, 49 U.S.C. § 1303, 1348; P.Ap. 35a-38a) and that Congress did so, with the overriding interest of safety in mind, to assure unified control over the navigable airspace and over air navigation. Plenary authority in the matter of air traffic rules was vested in the FAA (S. Rep. No. 1851, 85th Cong., 2d Sess.

13-15 (1958)). If a locality like Hempstead believes an airport is improperly operated, it may file a complaint with the FAA. 49 U.S.C § 1482.

It is not for the courts to decide how air traffic at an airport should be routed, or whether the Town's "plan" would impair safety or reduce traffic capacity. Those and all other aspects of any plan to regulate air traffic or deal with the use of the navigable airspace are extremely complex subjects reserved for the expertise of the FAA.* That is basically why judicial consideration of the "plan" belatedly proposed by the Town is irrelevant (D.C.Op., P.Ap. 25a, 31a-34a). See also, *City of Newark* v. *Eastern Airlines, Inc.*, 159 F.Supp. 750, 757-58 (D.N.J. 1958), and *Loma Portal Civic Club* v. *American Airlines, Inc.*, 39 Cal. Rptr. 708, 394 P.2d 548, 554 (1964).

(b) ***No conflict exists between the decision of the District Court in this case on the question of preemption and the holding of any other court, state or federal.***

This second argument for review need be discussed only briefly because, as the Town recognizes (Pet. 4), the Court of Appeals did not base its decision on preemption. The only conflict between decisions that is argued by the Town as a basis for review is that alleged to exist on the issue of preemption between the District Court in the present case, and the *Cedarhurst* case, *supra,* on the one hand, and *Loma Portal Civic Club* v. *American Airlines, Inc.*, 39 Cal. Rptr. 708, 394 P.2d 548 (1964), on the other. This issue

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* As to the complexity of air traffic regulation, see C.A.Op. n. 2, P.Ap. 8a-13a; D.C.Op., P.Ap. 26a-28a, 31a.

is obviously not one of state law, as described by this Court's Rule 19(b). In any event *Loma Portal* did not involve an ordinance at all, but rather an action by property owners to enjoin airline operations at San Diego's Lindbergh Field. The California Supreme Court affirmed a summary judgment *denying* such an injunction. In *dicta* the court did decline to say that federal aviation legislation was clearly intended to be exclusive in all areas relating to aviation, pointing out that it did not wish to preclude the enforcement of state-created rights to damages, the imposition of state property taxes, and the entertainment of wrongful death actions against airlines. However, the California Supreme Court also said that "we could not enjoin a pilot from flying in the landing pattern that he was ordered to follow by the [federal] control tower . . ." (394 P.2d at 554), and specifically distinguished *Cedarhurst* on the ground that it involved a local ordinance (394 P.2d at 555).

To the best of our knowledge there is only one other case (besides *Cedarhurst* and the present one) which has considered whether federal preemption of the fields of air traffic safety and control and airspace management invalidates local aircraft noise ordinances, and that one held in the affirmative, agreeing with *Cedarhurst* and Judge Dooling. *American Airlines, Inc. et al.* v. *City of Audubon Park,* No. 5828, W.D.Ky., April 1, 1968 (unreported, but appeal pending). In that case a summary judgment permanently enjoining the enforcement of a 750-foot minimum altitude ordinance passed by a suburb of Louisville was granted on the grounds, among others, of preemption and conflict with federal regulation. Moreover, the only expressions of *dicta* on the point of which we are aware were in

agreement. *City of Newark* v. *Eastern Airlines, Inc.*, 159 F. Supp. 750, 755 (D.N.J. 1958); *Redman* v. *Patterson*, No. 14869/60, Sup.Ct., Nassau Co., New York, January 4, 1961 (unreported). See also, *Northwest Airlines* v. *Minnesota*, 322 U.S. 292, 303 (1944) (concurring opinion); *Chronister* v. *City of Atlanta*, 99 Ga. App. 447, 108 S.E.2d 731, 734 (1959); *Scandinavian Airlines System, Inc.* v. *County of Los Angeles*, 56 Cal.2d 11, 37, 363 P.2d 25 (1961), *cert. den.*, 368 U.S. 899 (1961); *Public Utilities Code of California* § 21240.

The Town's contention that there is no preemption because federal aviation legislation does not contain "noise criteria" (Pet. 6), which the Ordinance does, is not only irrelevant to the issue of whether there are conflicting decisions but is unsound. The argument is unsound because local regulation of noise would require conduct inconsistent with federal directives, as the trial court found (findings Nos. 282, *et seq.*, P.Ap. 3a-4a), and because the fact that noise control, rather than airspace or air traffic regulation, is the nominal objective of the Ordinance, does not save it from invasion of the preempted fields (D.C.Op., P.Ap. 24a). See also, *Local 24, Int'l Bh'd of Teamsters* v. *Oliver*, 358 U.S. 283, 297 (1959); *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 479-81 (1955); *Napier* v. *Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 612-13 (1926). Not even complementary local regulation is permissible where the federal interest is dominant. *Campbell* v. *Hussey*, 368 U.S. 297, 302 (1961). The argument is also unsound because the FAA "is not free to ignore, and it has not ignored, noise abatement considerations" * (D.C.Op., P.Ap. 30a).

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* Since the decision by the Court of Appeals, Title VI of the Federal Aviation Act has been amended to require the Administra-

(c) *The unquestioned fact that aircraft noise is a problem of national importance is not sufficient basis for granting a writ in this case.*

The respondents do not know of any other "litigation involving aircraft noise ordinances or minimum altitude ordinances . . ." that has "been stayed pending ultimate decision on the Town's Ordinance" (Pet. 7), even though they believe they would be informed if there were any. Respondents do agree that if the Ordinance were ultimately sustained "one could almost certainly expect similar type ordinances being enacted by communities" (Pet. 7) across the country, and even around the same airports. It could be expected that these would impair safety by imposing a variety of requirements on aircraft, not necessarily consistent with FAA controls. Furthermore, ordinances or plans of neighboring towns would be likely to be mutually contradictory; like Hempstead, each would endeavor to require aircraft to fly over the others (see D.C.Op., P.Ap. 33a). This is an additional practical argument in support of the decisions below, even when looked at from the point of view of airport communities themselves (see D.C.Op., P.Ap. 20a, 25a, 33a). However, the fact that the subject matter generally is of importance is not sufficient reason for reviewing a ruling which is unquestionably correct as to the precise issue presented by the case. STERN & GRESSMAN, SUPREME COURT PRACTICE 255 (3d ed. 1962).

For a realistic appreciation of the background of this case it should be understood that "the aircraft are operated

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tor of the FAA to prescribe standards for the measurement of aircraft noise and sonic boom and, subject to certain stated considerations, to prescribe such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom. P.L. 90-411, 82 Stat. 395 (1968).

in a thoroughly responsible manner . . . " (D.C.Op., P.Ap. 22a) and that "the aircraft noise problem" is "not a consequence of the failure to take feasible precautions or to provide practical remedies" (D.C.Op., P.Ap. 20a). The respondents and the FAA have all been working for years, with numerous others, to try to alleviate the noise from aircraft. See, *e.g.*, S. Rep. No. 1353, 90th Cong., 2d Sess. (1968). They cooperated, for example, in the 167-page report of the Office of Science and Technology's Jet Aircraft Noise Panel, entitled *Alleviation of Jet Aircraft Noise Near Airports* (March, 1966), which charted the work which has since been carried on by the respondents and others under federal leadership. This work has included research on jet aircraft noise reduction at the source, operational improvements to reduce noise by means approved by the FAA as consistent with safety, and suggested limitations on land use near airports to encourage uses compatible with the noise (which are the three possible means to alleviate aircraft noise).

(d) *There is no novel question of federal statutory interpretation.*

The Town raises the supposed interpretative question of "whether this federal legislation is dependent upon local laws for measurement of its terms or is intended to operate uniformly throughout the nation" (Pet. 8). "Measurement", in this context, can only mean the imposition by local laws of limitations on the flight of aircraft and on their right to use the navigable airspace (whether directly, or indirectly by noise limits). However Congress has, among other things, declared "a public right of freedom of transit through the navigable airspace of the United

States" (49 U.S.C. § 1304), has delegated control of its use to the FAA (49 U.S.C. § 1348(a)), and has also delegated control over air traffic rules and regulations to the FAA (49 U.S.C. § 1348(c)). This case does not involve any question of statutory interpretation but rather, as found in the District Court, the head-on conflict of a local enactment with federal regulation.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

November 12, 1968

Respectfully submitted,

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APPENDIX

Constitutional, Statutory and Other Provisions

United States Constitution, Article VI, clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Article I, Section 8:

"The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

Unnecessary Noise Ordinance (No. 25) of the Town of Hempstead: Article II, as amended (see Record, pp. 4112-15, 4470-72):

ARTICLE II

REGULATION OF AND LIMITATION UPON TRANSIENT SOUND FROM AIRCRAFT IN FLIGHTS AND ANY AND ALL OTHER DEVICES OF A MECHANICAL NATURE.

1. Definitions of words and phrases used in this ordinance.

(a) "Person":—Includes any individual, firm, association or corporation, whether such person be

the owner, lessee or charterer, his or its pilots or co-pilots as to aircraft, and any individual firm, association and corporation, its servants, agents or employees as to any other sound producing device or mechanism.

(b) "Noise":—Noise is any increase in the ambient noise, measured as provided in this Article, caused by any mechanical device including aircraft.

(c) "Ambient Noise":—Ambient noise is the all-encompassing noise associated with a given environment.

(d) "Bel":—The bel is a unit of level when the base of a logarithm is 10 and is restricted to levels of quantities proportional to power.

(e) "Decibel":—The decibel is one-tenth of a bel and is a unit of level when the base of the logarithm is the tenth root of ten, and the quantities concerned are proportional to power.

(f) "Spectrum":—A spectrum is a function of time and is a description of its resolution into components, each of different frequency and is also used to signify continuous range of components usually wide in extent within which waves have some specified characteristics such as "audio-frequency spectrum" and is also applied to functions of variables other than time.

(g) "Sound Pressure Level":—The sound pressure level, in decibels, of a sound is 20 times the logarithm to the base 10 of the ratio of the pressure of this sound to the reference pressure, which reference pressure must be explicitly stated.

(h) "Band Pressure Level":—The band pressure level of a sound for a specified frequency band is the sound pressure level for the sound contained within the restricted band. The reference pressure must be specified.

(i) "Cycle":—A cycle is the complete sequence of values of a periodic quantity that occur during a period.

(j) "Frequency":—The frequency of a function periodic in time is the reciprocal of the primitive period. The unit is the cycle per unit time and must be specified.

(k) "Microbars":—A microbar is a unit of pressure commonly used in acoustics and is equal to 1 dyne per square centimeter.

(l) "Sound-Level Meter":—A sound-level meter is an instrument including a microphone, an amplifier, an output meter, and frequency weighting networks for the measurement of noise and sound levels in the manner provided by this Article.

(m) "Sound Analyzer":—A sound analyzer is a device for measuring the band-pressure level or pressure spectrum level of a sound as a function of frequency.

(n) "Duration":—The duration of a transient noise from a machine during the entire period when the transient noise is first distinguished from the ambient noise until the noise from the same machine finally recedes into the ambient noise, shall be the period of the beginning when the transient noise first exceeds a certain band pressure

level until it no longer exceeds the same band pressure level and providing it remains above the same band pressure level for at least one-third of the total duration.

(o) "Transient Noise":—Any noise having a duration of one minute or less shall be considered a transient noise and the limits of Table I of this ordinance shall apply.

(p) "Steady Noise"—Any noise having a duration in excess of one minute shall be considered a steady noise and the limits of Table II of this ordinance shall apply.

2. No person shall operate or cause to be operated any mechanism or device (including but not limited to airplanes) which shall create a noise within the Town of Hempstead exceeding the limiting noise spectra set forth in Tables I and II as follows:

TABLE I

Limiting Noise Spectrum for Steady Noise

Band Pressure Level Decibels Re 0.0002 Microbars	*Octave Band Center Frequency Cycles per Second*
92	63
87	125
79	250
72	500
66	1000
60	2000
54	4000
52	8000

During the daytime from 7:00 A.M. to 7:00 P.M. the limits of TABLE I hereinbefore set forth shall apply to transient noise having a duration in excess of twelve (12) seconds. During the night from 7:00 P.M. to 7:00 A.M. the same limits shall apply to transient noises having a duration in excess of six (6) seconds.

TABLE II

LIMITING NOISE SPECTRUM FOR STEADY NOISE

Band Pressure Level Decibels Re 0.0002 Microbars	*Octave Band Center Frequency Cycles per Second*
72	63
67	125
59	250
52	500
46	1000
40	2000
34	4000
32	8000

3. Noise measurements and limits shall conform to the following practices:

   (a) Noise shall be measured at an altitude not exceeding 100 feet above sea level.

   (b) Measurements of noise emanating from any mechanism or device including, but not limited to, motor vehicles, shall be made at a distance of at least 100 feet from the longitudinal center line of the vehicle.

(c) Machinery noise originating on private property shall be measured at the property line of the property on which the noise source is located.

4. If any clause, sentence, paragraph, section or part of this article shall be adjudged by any Court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the litigation in which such judgment shall have been rendered.

5. Penalties:—Any person violating any provision of this article shall be liable to a penalty not exceed-One Hundred ($100.00) Dollars for each offense and a violation of this ordinance or any part thereof shall constitute disorderly conduct and any person violating the same shall be a disorderly person.

6. This article shall become effective in accordance with the provisions of Section 133 of the Town Law of the State of New York.